Filed 4/19/10 Barton v. Commerce West Ins. Co. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DERREL RAY BARTON, Plaintiff and Appellant, v. COMMERCE WEST INSURANCE COMPANY, Defendant and Respondent.	E048248 (Super.Ct.No. RIC428478) **OPINION**

APPEAL from the Superior Court of Riverside County. Gary B. Tranbarger, Judge. Affirmed.

Richland & Associates and Felipa R. Richland for Plaintiff and Appellant.

Borton Petrini and Daniel L. Ferguson for Defendant and Respondent.

Defendant Commerce West Insurance Company (CW) issued an auto insurance policy to plaintiff Derrel Ray Barton. At the time, as CW knew, Barton's license had been suspended. It was CW's practice to issue an insurance policy to a person whose license had been suspended, but only for 30 days, to give the person a grace period in which to reinstate his or her license.

Thus, despite having just issued the policy, CW mailed notice to Barton almost immediately that it was being canceled, effective in 30 days. Barton claims that he did not receive this notice. He did in fact reinstate his license before the cancellation went into effect; however, he did not notify CW that he had done so.

A few months later, Barton was badly injured in an auto accident. He sued the other driver, who conceded liability but took the position that Barton had been uninsured at the time of the accident and therefore, under Proposition 213, could not recover noneconomic damages. Barton asked CW to rescind its cancellation of the policy, but it refused to do so. Barton therefore settled with the other driver for only $100,000, representing economic damages, even though he allegedly could have proven over $1 million in noneconomic damages.

Barton then filed this action for breach of contract and breach of the implied covenant of good faith and fair dealing against CW. CW moved for summary judgment on multiple grounds, including that its cancellation of the policy was valid and effective. The trial court granted the motion.

Barton appeals. We will hold that he has not identified any triable issue of fact with respect to whether CW's cancellation of the policy was valid and effective. Hence, we will affirm. We need not consider any of the alternative grounds that CW raised in its motion for summary judgment.

I

FACTUAL BACKGROUND

The following facts are taken from the evidence introduced in connection with CW's motion for summary judgment.

On October 12, 2001, Barton's license was suspended for a failure to appear.

On November 7, 2001, Barton applied to CW for an auto insurance policy. At the time, he was not aware that his license had been suspended. For this reason, in his application, he stated that his license had not been suspended.

Also on November 7, 2001, CW learned from the Department of Motor Vehicles that Barton's license had been suspended. However, it was CW's practice to issue a policy to a person with a suspended license, subject to cancellation within 30 days, thus providing a grace period to get the license reinstated and to notify CW of the reinstatement.

Accordingly, on November 27, 2001, CW issued a policy to Barton, effective retroactively to November 7, 2001. Two days later, however, on November 29, 2001, it mailed a cancellation notice to Barton, at the address given in his application. The stated reason for cancellation was a "[s]ubstantial [i]ncrease in [h]azard," in that Barton's license had been suspended. The cancellation was due to become effective on December 28, 2001. According to Barton, he never received the cancellation notice.[1]

[1] Supposedly, when CW later took Barton's recorded statement, he admitted that he had moved to a different apartment in the same complex without notifying CW. In his deposition, however, he denied this.

In January 2002, CW mailed a refund of the unused premium to Barton, again at the address given in his application. The refund check was never cashed.

On December 4, 2001, Barton's license was reinstated. However, consistent with his claim that he did not know that his policy had been canceled, he did not notify CW that it had been reinstated. CW did not independently check to see whether it had been reinstated.

In March 2002, Barton was in an accident when another car crossed over the center divider and struck his vehicle head on. As a result, Barton sustained serious and permanent injuries.

On March 12, 2002, Barton submitted a claim to CW. On March 23, 2002, CW denied coverage on the ground that the policy had been cancelled.

Barton sued the other driver for personal injuries. The other driver admitted liability. In a nonbinding arbitration, the arbitrator awarded Barton $1,260,000. The other driver, however, filed a request for a trial de novo, then asserted as a defense that Barton had been uninsured at the time of the accident and therefore was not entitled to recover noneconomic damages. (See Civ. Code, § 3333.4.)

Barton asked CW to rescind its cancellation of the policy. CW referred this request to its outside counsel, asking them to provide a legal opinion regarding coverage and to recommend how it should respond. CW's outside counsel determined that the policy had been properly canceled. Accordingly, CW refused to rescind the cancellation.

In March 2005, Barton settled his action against the other driver for $100,000, representing exclusively economic damages.

II

PROCEDURAL BACKGROUND

In April 2005, Barton filed this action, asserting causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory relief.[2]

Barton filed a motion for summary judgment. The trial court denied the motion.

CW then filed its own motion for summary judgment. It argued, among other things, that: (1) its cancellation of the policy was valid and effective; and (2) it was not liable for any additional amount that Barton could have recovered from the other driver, because Barton had failed to assert in his action against the other driver that the cancellation of the policy was invalid.

The trial court granted the motion. Accordingly, it entered judgment against Barton and in favor of CW.

---

[2] The Sumner Company, Inc. was also named as a defendant. It apparently failed to answer the complaint, resulting in the entry of its default.

III

STANDARD OF REVIEW

"A trial court may only grant a motion for summary judgment if no triable issues of material fact appear and the moving party is entitled to judgment as a matter of law. [Citations.]" (*Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 618.)

"[I]n moving for summary judgment, a 'defendant . . . has met' his 'burden . . . if' he 'has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. . . .' . . . [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.)

"We review de novo a trial court's grant of summary judgment along with its resolution of any underlying issues of statutory construction. [Citation.]" (*Schachter v. Citigroup, Inc.*, *supra*, 47 Cal.4th at p. 618.) "[W]e 'view the evidence in the light most favorable to plaintiff[] as the losing part[y]' and 'liberally construe plaintiff['s] evidentiary submissions and strictly scrutinize defendant['s] own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff['s] favor.' [Citation.]" (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 96-97.)

IV

THE VALIDITY OF THE CANCELLATION

Barton contends that CW's cancellation of the policy was invalid for three reasons: (1) Insurance Code section 1861.03 prohibited the cancellation of the policy based on the suspension of the insured's license; (2) CW had waived any right to cancel by issuing the policy; and (3) there was a triable issue of fact as to whether CW actually mailed the notice of cancellation.

Preliminarily, we emphasize that Barton is *not* contending that the cancellation was invalid for any *other* reason. Thus, for example, he is no longer arguing, as he did below, that the cancellation was invalid because CW had constructive notice that his license had been reinstated. We deem him to have forfeited all such other contentions. (*Doe v. California Dept. of Justice* (2009) 173 Cal.App.4th 1095, 1115.)

A. *Insurance Code Section 1861.03.*

Two statutes govern the cancellation of an auto insurance policy.

Insurance Code section 661, originally enacted in 1968 (Stats. 1968, ch. 137, § 2, p. 352), as relevant here, provides:

"(a) A notice of cancellation of a policy shall be effective only if it is based on one or more of the following reasons:

"(1) Nonpayment of premium.

"(2) *The driver's license . . . of the named insured . . . has been under suspension or revocation during the policy period . . . .*

"(3) Discovery of fraud by the named insured in pursuing a claim under the policy provided the insurer does not rescind the policy.

"(4) Discovery of material misrepresentation of any of the following information . . . :

"(A) Safety record.

"(B) Annual miles driven in prior years.

"(C) Number of years of driving experience.

"(D) Record of prior automobile insurance claims, if any.

"(E) Any other factor found by the commissioner to have a substantial relationship to the risk of loss. [¶] . . . [¶]

"(5) *A substantial increase in the hazard insured against.*

"(b) *This section shall not apply to any policy . . . that has been in effect less than 60 days* at the time notice of cancellation is mailed or delivered by the insurer . . . ." (Italics added.)

Insurance Code section 1861.03, subdivision (c)(1), enacted in 1988 as part of Proposition 103, provides: "*Notwithstanding any other provision of law*, a notice of cancellation . . . of a policy for automobile insurance shall be effective only if it is based on one or more of the following reasons: (A) nonpayment of premium; (B) fraud or material misrepresentation affecting the policy or insured; (C) *a substantial increase in the hazard insured against*." (Italics added.)

Insurance Code section 661, subdivision (b) has been construed to mean that a policy that has been in effect for less than 60 days can be canceled for any reason, or for no reason. However, Insurance Code section 1861.03, subdivision (c)(1) has been held to override Insurance Code section 661, subdivision (b) and thus to abrogate an insurer's unfettered right to cancel within 60 days. (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 826, fn. 19; *Mackey v. Bristol West Ins. Service of Cal., Inc.* (2003) 105 Cal.App.4th 1247, 1258, fn. 6.)

Insurance Code section 661 lists license suspension as cause for cancellation, while Insurance Code section 1861.03 does not. Barton therefore argues that Insurance Code section 1861.03 *also* abrogated an insurer's right to cancel a policy based on a license suspension (at least during the first 60 days that the policy is in effect, as here). Both sections, however, do allow cancellation based on a substantial increase in the hazard. Accordingly, Insurance Code section 1861.03 does not prevent an insurer from cancelling a policy based on a license suspension that substantially increases the hazard. Indeed, the drafters of the section could well have reasoned that *any* license suspension substantially increases the hazard, and hence there was no need to specify license suspension separately.

The voters who enacted Proposition 103 were informed that it would "require[] insurance companies to offer motor vehicle insurance to good drivers at reduced rates." (Ballot Pamp., Gen. Elec. (Nov. 8, 1988) analysis of Prop. 103 by the Legislative Analyst,

p. 98.)[3] It would also "force[] insurance companies to base your rates on your driving record first, rather than where you live." (Ballot Pamp., Gen. Elec., *supra*, rebuttal to argument against Prop. 103, p. 101.) Admittedly, we are dealing here not with the rate structure for a policy, but with the cancellation of a policy. Nevertheless, it appears perfectly consistent with the legislative intent behind Insurance Code section 1861.03 to permit cancellation based on a blemished driving record, including a license suspension. As CW argued below, it would be startling if the legislative intent was to *require* insurance companies to insure drivers who had done something bad enough to result in license suspension.

Barton therefore also argues that the suspension of his license was not a substantial increase in the hazard, for two reasons. First, he argues that by December 28, 2001, when the cancellation took effect, his license had been reinstated. Even so, it is undisputed that the initial reason for the cancellation was the suspension of his license, and CW did not learn that it had been reinstated until sometime after the cancellation took effect.[4] Second, he argues that CW already knew that his license had been suspended when it issued the policy. It is undisputed, however, that CW intended to accept the increased risk for a 30-day grace period, and no longer.

---

[3] Available at http://traynor.uchastings.edu/ballot_pdf/1988g.pdf, as of April 8, 2010.

[4] As already noted, Barton is not arguing in this appeal that CW could not cancel without checking to see whether his license had been reinstated.

B. *Waiver*.

Next, Barton argues that, because CW knew that his license had been suspended but issued the policy anyway, it waived its right to cancel the policy on this ground. Somewhat unhelpfully, CW does not respond to this argument. Nevertheless, based on our own analysis, we reject it.

"The 'test for waiver in the context of insurance contracts parallels the general rules for finding a waiver. In general, to constitute a waiver, there must be an existing right, a knowledge of its existence, an actual intention to relinquish it, or conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it has been relinquished.' [Citation.]" (*Pacific Business Connections, Inc. v. St. Paul Surplus Lines Ins. Co.* (2007) 150 Cal.App.4th 517, 525.) "'The burden . . . is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and "doubtful cases will be decided against a waiver" [citation].' [Citations.]" (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31.)

Here, CW had no actual intention to relinquish its right to cancel the policy; at the same time as it issued the policy, it already intended to cancel it, unless it was notified within 30 days that Barton's license had been reinstated. Moreover, its conduct was not inconsistent with the intent to enforce its right to cancel. To the contrary, its conduct was consistent with its actual intent — it did issue the policy, but almost immediately thereafter, it mailed notice to Barton that the policy was subject to being canceled within 30 days. The two-day lapse of time between the issuance of the policy and the issuance

of the cancellation notice was trivial and could not have misled anybody. Certainly this was not a case where there was any threat that the insurer might sit back and pocket the premiums, and then cancel the policy if the insured made a claim. (Cf. 1 Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2009) ¶ 5.301.1, p. 5-72.)

C. *The Mailing of the Notice*.

Finally, Barton argues that the fact that he never received the cancellation notice raises a triable issue of fact as to whether it was mailed at all. Once again, CW fails to respond to this argument.

Barton relies on the following language from *Him v. City and County of San Francisco* (2005) 133 Cal.App.4th 437: "If, normally, an item properly mailed is received, then evidence of nonreceipt is logically probative of nonmailing and, absent contrary statutory authority, sufficient to raise a triable issue of fact and defeat summary judgment." (*Id*. at p. 445.)

This language, however, has been taken out of context. *Him*, when read properly, actually supports the conclusion that there was no triable issue of fact in this case. There, the key issue was whether the defendant had mailed notice to the plaintiffs that their governmental tort claim had been rejected; if it had mailed the notice on the date that it claimed, the action was time-barred. The defendant filed a motion for summary judgment, supported by evidence that the notice had been mailed. (*Him v. City and County of San Francisco, supra,* 133 Cal.App.4th at p. 440.) The plaintiffs, however, introduced evidence that they had never received it. (*Id*. at pp. 441, 444-445.)

The appellate court held that the defendant was entitled to summary judgment. It began by acknowledging, in the language quoted above, that "normally" and "absent contrary statutory authority," evidence of nonreceipt would raise a triable issue of fact as to mailing. (*Him v. City and County of San Francisco*, *supra*, 133 Cal.App.4th at p. 445.) It reasoned, however, that there *was* contrary statutory authority. It cited Government Code section 915.2 (*Him*, at p. 445), which provided that such a notice "must be 'deposited in the United States post office [or] a mailbox . . . or other similar facility . . . , in a sealed envelope, properly addressed, with postage paid. The . . . notice shall be deemed to have been presented and received at the time of the deposit. . . .'" (*Him*, at pp. 442-443.) It added: "The statute of limitations period is triggered 'from the date the notice is deposited in the mail by the public entity, and not the date it is received by the claimant or counsel.' [Citation.] In fact, a claimant is required to comply with the six-month statute of limitations associated with government tort claims upon proof that the notice of rejection was served even if it was not actually received by the claimant. Thus, the Legislature has placed upon the claimant the risk that a properly mailed notice of claim rejection is not delivered due to an error by the postal authorities." (*Id*. at p. 445.)

The court "conclude[d] plaintiff's evidence of nonreceipt of the claim rejection notices is legally insufficient to raise a triable issue of fact negating the . . . statute of limitations defense. In view of the [defendant]'s evidence of proof of mailing, the trial court was correct to conclude that plaintiffs' lawsuit was barred." (*Him v. City and County of San Francisco*, *supra*, 133 Cal.App.4th at p. 445.)

Here, much as in *Him*, the Legislature has statutorily placed the risk of nondelivery on the insured. Insurance Code section 664 provides: "Proof of mailing of notice of cancellation . . . to the named insured at the address shown in the policy . . . shall be sufficient proof of notice." Accordingly, to prove that the notice was effective, CW needed to prove only that it was mailed, not that it was received. In light of this statutory scheme, the evidence that Barton did not actually receive the notice did not raise a triable issue.

We therefore conclude that CW's cancellation of the policy was valid and effective. It follows that the trial court properly granted summary judgment for CW.

V

DISPOSITION

The judgment is affirmed. In the interests of justice, each side shall bear its own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

MILLER
J.